UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

BARRY S. MAY,	)	
	)	
PETITIONER	)	
	)	
	)	**CIVIL NO. 04-210-P-H**
v.	)	**[CRIM. NO. 01-92-P-H-02]**
	)	
UNITED STATES OF AMERICA,	)	
	)	
RESPONDENT	)	

ORDER ON PETITIONER'S MOTION TO AMEND PETITION FOR COLLATERAL REVIEW AND ORDER AFFIRMING RECOMMENDED DECISION OF THE MAGISTRATE JUDGE

MOTION TO AMEND PETITION

The petitioner moves under Federal Rule of Civil Procedure 15(a) for leave to amend his 28 U.S.C § 2255 petition to allege sentencing error under United States v. Booker, 125 S. Ct. 738 (2005), a case decided about two-and-a-half years after the petitioner's sentencing. The petitioner contends that he should be able to amend his petition because Booker applies retroactively to 18 U.S.C. § 2255 cases on collateral review. See Mot. to Amend Pet. for Collateral Review at 2-6 (Docket Item 14). But the only courts of appeals to decide the question so far have consistently held that Booker does not apply retroactively to cases on collateral review. See Humphress v. United States, 398 F.3d 855, 860 (6th Cir. 2005); Varela v. United States, 400 F.3d 864, 868 (11th Cir. 2005); McReynolds v

United States, 397 F.3d 479, 481 (7th Cir. 2005); cf. United States v. Price, 400 F.3d 844, 849 (10th Cir. 2005) (holding that Blakely v. Washington, 124 S. Ct. 2531 (2004), does not apply to convictions already final when it was decided). The First Circuit has not yet addressed the issue but would likely agree with this consensus, particularly in light of its holding in Sepulveda v. United States, 330 F.3d 55, 63 (1st Cir. 2003), that Apprendi v. New Jersey, 530 U.S. 466 (2000), announced a new rule of criminal procedure that does not apply retroactively to cases on collateral review. The reasoning in Sepulveda applies to Booker, which extended the rule announced in Apprendi. See Sepulveda, 330 F.3d at 60 ("The procedural error to which the petitioner adverts may raise questions as to the length of his sentence, but inaccuracies of this nature, occurring after a defendant has been duly convicted, are matters of degree and do not trump . . . the general rule of nonretroactivity") (internal quotations omitted). Because Booker does not apply retroactively to cases on collateral review, it would be futile to amend the section 2255 petition to add Booker claims.

Even if Booker applied retroactively in this case, amendment of the petition to add Booker claims would be futile because the petitioner would receive the same sentence under the current, post-Booker system of advisory Sentencing Guidelines as he did under the system of mandatory Sentencing Guidelines in effect at his sentencing. As the sentencing judge, I am in a unique position to

evaluate the petitioner's Booker claim.[1] I sentenced the petitioner in July 2002. The guideline range for his sentence was 210 to 262 months. Based on the Government's motion for a downward departure under Guideline 5K1.1, I sentenced the petitioner below the guideline minimum to 174 months, a sentence lower than the Government had requested.

I would not have reached a different result using advisory guidelines. I already exercised discretion to sentence outside the guidelines based on the Government's motion for a downward departure (albeit a discretion limited to factors listed and factors like those listed in Guideline 5K1.1). I did not express any reservations about following the guidelines. My analysis would differ somewhat under the current system because, after calculating the now-advisory guideline sentence, I would determine whether to apply that sentence by considering the sentencing factors in 18 U.S.C. § 3553(a). See, e.g., United States v. Revock, 353 F. Supp.2d 127, 129 (D. Me. 2005). But based on my review of the transcript of the sentencing hearing, the sentencing memoranda, the

[1] If the First Circuit considered (and the rule of nonretroactivity did not bar) the petitioner's Booker claim, under the plain error test used for Booker claims not argued in district court, the First Circuit would consider whether I would have imposed "a lesser sentence in a post-Booker regime of advisory guidelines." United States v. Heldeman, No. 04-1915, __F.3d__, 2005 WL 708397, at *3 (1st Cir. March 29, 2005). If the petitioner could show a reasonable indication that the result would have been different, then the First Circuit would remand the case, and I could "say no with a minimum expenditure of effort if the sentence imposed under the pre-Booker guidelines regime is also the one that [I] would have imposed under the more relaxed post-Booker framework." Id. Guided by the First Circuit's plain error analysis, I say now, reviewing a sentence that I imposed, that the sentence that I imposed pre-Booker is the same as the sentence I would have imposed under the post-Booker system of advisory guidelines.

Presentence Report and my notes and knowledge of the petitioner's case, none of the section 3553(a) factors would have led me to a lower sentence. There is no point in the petitioner adding Booker claims to his petition when his sentence would be the same under Booker as it was when he was sentenced.

The petitioner moves in the alternative to amend his petition to claim ineffective assistance of counsel because his counsel at his plea, sentencing and appeal did not argue for the use of advisory guidelines, the approach later mandated by Booker.[2] For the petitioner to succeed on his ineffective assistance of counsel claim, he "must establish that his counsel's performance fell below an objective standard of reasonableness and 'that there was a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different.'" United States v. Theodore, 354 F.3d 1, 5-6 (1st Cir. 2003) (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)). Even if the petitioner satisfied the first prong of the Strickland test by showing that his counsel acted unreasonably in failing to argue for advisory guidelines, the petitioner could not, under the second prong of the test, show that his sentence

[2] The petitioner contends that his counsel should have raised "the Booker issue," characterized as "the mandatory/advisory consideration of the Guidelines and whether the Guidelines were subject to the jury trial requirements of the Sixth Amendment such that a jury must find certain sentencing facts." Mot. to Amend at 6. I only address whether the petitioner's counsel should have argued for advisory guidelines, because "[t]he [Booker] error is not that a judge (by a preponderance of the evidence) determined facts under the Guidelines which increased a sentence beyond that authorized by the jury verdict or an admission by the defendant; the error is only that the judge did so in a mandatory Guidelines system." United States v. Antonakopoulos, 399 F.3d 68, 75 (1st Cir. 2005).

would have been different, as noted above. Amendment would be futile because the petitioner would be unable to satisfy the requirements for his ineffective assistance claim.

I therefore **DENY** the motion to amend the petition for collateral review.

RECOMMENDED DECISION

The United States Magistrate Judge filed with the court on January 24, 2005, with copies to the parties, her Recommended Decision on the petitioner's 28 U.S.C. § 2255 motion. The defendant filed his objection to the Recommended Decision on March 10, 2005. I have reviewed and considered the Recommended Decision, together with the entire record; I have made a *de novo* determination of all matters adjudicated by the Recommended Decision; and I concur with the recommendations of the United States Magistrate Judge for the reasons set forth in the Recommended Decision, and determine that no further proceeding is necessary.

It is therefore **ORDERED** that the Recommended Decision of the Magistrate Judge is hereby **ADOPTED**. The petitioner's 28 U.S.C. § 2255 motion is **DENIED** without an evidentiary hearing.

Finally, I also find at this time that no certificate of appealability should issue because there is no substantial issue that could be presented on appeal. See Fed. R. App. P. 22(b)(1); 1st Cir. R. 22.1(a).

SO ORDERED.

DATED THIS 8TH DAY OF APRIL, 2005

/s/D. Brock Hornby
D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
DISTRICT OF MAINE (PORTLAND)
CIVIL DOCKET FOR CASE #: 2:04CV210

Barry S. May

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